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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 328

T. VAIL PALMER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (Pet. 48–54) is reported at 122 F. Supp. 938. The majority and the dissenting opinions in the Court of Appeals (Pet. 21–38) are reported at 223 F. 2d 893.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1955 (R. 28). The time for filing the petition for a writ of certiorari was extended by Mr. Justice Burton to August 19, 1955, and the petition was filed on August 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner can challenge the legality of his I–A classification under the Universal Military Training and Service Act where he has refused to avail himself of the administrative procedures for securing a different classification.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Universal Military Training and Service Act and the regulations issued thereunder appear in the Appendix, *infra*, pp. 12–15.

STATEMENT

Petitioner was convicted of failure to report for induction under the Universal Military Training and Service Act. He was fined $500, imposition of sentence of imprisonment was suspended, and he was placed on probation for three years.

The record shows the following:

Petitioner, a life-long Quaker, refused to register under the Selective Service Act of 1948 and was convicted therefor in November 1950 in the United States District Court for the Eastern District of Pennsylvania (R. 22; see Pet. 48). He served his imprisonment sentence of one year and one day. Prior to his release from the federal penitentiary, the prison warden registered him without his cooperation, as permitted under the Selective Service Regulations (32 C. F. R. 1613.41, *infra*, pp. 13–14) (see Pet. 48). In December 1951, the draft board sent him SSS Form No. 100 (classification ques-

tionnaire) which he immediately returned unfilled and unexecuted, together with a letter in which he said that "my act of refusal to register stems from a basic opposition to the Selective Service Act as a whole, and that I can thus no more comply with any other portion of that Act than I could with registration" (R. 22–23; Pet. 42–43). He enclosed therewith a copy of a statement he had made to the court at the time of his first conviction which tended to show his conscientious and religious opposition to war. He also advised that he was a student at the Graduate School of Theology of Oberlin College (R. 20–22; Pet. 40–41, 42). On December 11, 1951, the Dean of that school wrote the board that petitioner was enrolled as a first year student in a three-year course of study and indicated willingness to submit further information concerning petitioner (R. 28).

On February 13, 1952, the board sent petitioner SSS Form No. 150, the special form required of those claiming conscientious objectors classifications. On February 14 the board classified him I–A. On February 15 petitioner returned the form unexecuted together with a letter in which he set forth his personal history, explained his conscientious objection to war and attributed it to his Quaker faith (R. 24–27; Pet. 44–47).

Petitioner did not communicate with his board after his letter of February 15 and made no effort of any kind to have his I–A classification changed.

He failed to report for physical examination as ordered by the board for February 15 and again for April 16, 1952. On May 5, 1952, the board ordered him to report for induction on May 20. His failure to comply with the May 20 induction order resulted in this prosecution (see Pet. 49–50).

Petitioner's principal defense consisted of a challenge to the validity of his I–A classification on the ground that the information before the board indicated that under Sections 4 (g) and (j) of the Act he should have been exempt either as a conscientious objector or as a divinity student (see Pet. 50). The District Court and the majority of the Court of Appeals held that petitioner, having refused to avail himself of the administrative machinery established in the Selective Service System, had no standing to challenge the validity of his classification (Pet. 48–54; 21–28).

ARGUMENT

Congress has established an elaborate system for the orderly administration of the selective-service laws applying to fifteen million men, a system which gives special recognition to the conscientious scruples of those opposed to war on religious grounds. The issue here is basically whether one may with impunity refuse to recognize and to utilize the administrative procedures established for the purpose of administering the exemptions which Congress has provided. The courts below have correctly concluded that a person required

to register under the selective service laws who wishes the benefit of a Congressional exemption must seek it by the means which Congress has provided, before he can assert in court that he has been improperly denied the benefits accorded him as a matter of Congressional grace.

That is the essence of the holdings of the courts below. If petitioner had chosen to avail himself of the administrative procedures provided by Congress, he might well have been deferred as a divinity student or classified as a conscientious objector. He refused, however, to apply for the special treatment given to persons in those categories in the manner established by the Act and the regulations, *i. e.*, by filing the necessary forms, and his local board apparently thought that his failure so to apply warranted its classifying him as available for military service. Having been so classified by his local board, petitioner failed or refused to take advantage of the appeal procedures available to a registrant who considers his classification by a local board to be improper. Petitioner has thus refused to submit to the administrative appeal process provided for his protection. Had he done so, the issues which petitioner seeks to litigate in this proceeding might never have arisen. In short, petitioner here seeks from the courts benefits which he refused to seek from the agency established by

Congress for the purpose of granting and withholding those benefits.

Petitioner's emphasis on the question of the validity of his original classification in the light of the information which he had supplied his local board (Pet. 5–6, 18–19) is misplaced. On this record, as the courts below held, the question of the validity of petitioner's classification does not arise, since petitioner failed to exhaust his administrative remedies by appeal, by taking the required physical examinations, and by reporting for induction as ordered. *Falbo* v. *United States,* 320 U. S. 549; *Skinner* v. *United States,* 215 F. 2d 767 (C. A. 9), certiorari denied, 348 U. S. 981.

Petitioner suggests (Pet. 9) that this Court's decision in *Estep* v. *United States,* 327 U. S. 114, by permitting the assertion of the defense of misclassification in a criminal prosecution, relaxed the *Falbo* rule. On the contrary, the Court in *Estep* reaffirmed the *Falbo* rule when it indicated that judicial review was available only when "all had been done which could be done" to obtain relief from the orders of the local board (327 U. S. at 123). Judicial review was held available in Estep's case because, unlike Falbo and unlike petitioner, Estep had exhausted his administrative remedies by unsuccessfully appealing his classification, by reporting for induction, and by being finally accepted at the induction station. See also *United States* v.

Balogh, 329 U. S. 692, vacating, on the authority of the *Falbo* decision, a judgment of the Court of Appeals for the Second Circuit (157 F. 2d 939), reversing a conviction for lack of a fair hearing where the administrative process had not been completed, the registrant having failed to report for induction as ordered.[1]

This Court and the various courts of appeals have consistently applied the *Falbo* rule to selective service cases where, as in this case, the administrative process had not been completed or the administrative remedies had not been exhausted. *United States* v. *Kalpakoff*, 217 F. 2d 748 (C. A. 9), certiorari denied, 348 U. S. 982; *Skinner* v. *United States*, 215 F. 2d 767 (C. A. 9), certiorari denied, 348 U. S. 981; *Williams* v. *United States*, 203 F. 2d 85 (C. A. 9), certiorari denied, 345 U. S. 1003; *United States* v. *Rinko*, 147 F. 2d 1 (C. A. 7), certiorari denied, 325 U. S. 851; *United States* v. *Flakowicz*, 146 F. 2d 874 (C. A. 2), certiorari denied, 325 U. S. 851; *Pacman* v. *United States*, 144 F. 2d 562 (C. A. 9), certiorari denied, 323 U. S. 786; *Stull* v. *United States*, 141 F. 2d 494 (C. A. 4), certiorari denied,

[1] In this Court's subsequent decisions in *Dickinson* v. *United States*, 346 U. S. 389; *Witmer* v. *United States*, 348 U. S. 375; *Sicurella* v. *United States*, 348 U. S. 385; *Simmons* v. *United States*, 348 U. S. 397; and *Gonzales* v. *United States*, 348 U. S. 407, where attacks upon classifications were allowed, the registrants had exhausted their administrative remedies.

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322 U. S. 745.[2] The rationale for denying relief in these cases is that the courts should not be called upon to review the actions of administrative agencies where the administrative processes have not been completely availed of—either because they have not been finished, as in *Estep* and *Falbo,* or because they have not been used, as in *Skinner,* or both, as in the instant case.

Under these principles, there are two separate grounds for denying petitioner the right to attack his classification. He failed to report for the required physical examinations and also to report for induction as ordered. For this reason alone, under *Falbo,* he has no standing to assert in the trial court the invalidity of his I–A classi-

[2] The dissenting opinion below (Pet. 35) suggests that the courts of appeals in *United States* v. *Greene*, 220 F. 2d 792 (C. A. 7), and *Rempel* v. *United States*, 220 F. 2d 949 (C. A. 10), did not require a showing that administrative remedies had been exhausted before considering the validity of the registrant's classification. But it appears from the decision in the former that the administrative appeal process had in fact been exhausted by registrant. See 220 F. 2d at 793. Although the opinion in the *Rempel* case does not indicate whether Rempel exhausted his administrative remedies, an examination of the Department of Justice file shows that Rempel in fact had exhausted his administrative appeal remedies prior to the prosecution. The additional cases cited by petitioner as in conflict with the cases cited in the text (see Pet. 7–9) are not to the contrary. In *Chih Chung Tung* v. *United States*, 142 F. 2d 919 (C. A. 1), for example, the registrant's administrative appeal was pending when the order for induction was issued. The court held that order invalid solely because petitioner had not been permitted to exhaust his administrative remedies.

fication. *United States* v. *Kalpakoff*, 217 F. 2d 748 (C. A. 9), certiorari denied, 348 U. S. 982. He might of course have been excluded from the active-service category at either stage. Thus, as spelled out in our brief in opposition in *Kalpakoff* (pp. 10–11), the fact that current regulations provide for a preinduction physical examination in no way affects the underlying rationale of the *Falbo* rule. Moreover, as the courts below held and we have pointed out, the fact remains that petitioner did not utilize the administrative appeal remedies open to him. For this additional, independent reason, petitioner cannot challenge the validity of his classification in this proceeding.[3] *Skinner* v. *United States*, 215 F. 2d 767 (C. A. 9), certiorari denied, 348 U. S. 981. It

[3] Petitioner's discussion of the requirements of the Administrative Procedure Act (Pet. 12–14) is beside the point. Contrary to petitioner's contention, with one exception not here relevant, all functions performed under the selective service laws are expressly exempted from the operation of the Administrative Procedure Act, including its provisions for judicial review. 50 U. S. C. App. 463; cf. 5 U. S. C. 1001 (a). Moreover, it may be noted by analogy that the Administrative Procedure Act specifically incorporates the exhaustion of remedies doctrine. See Section 10 (c), 5 U. S. C. 1009 (c); S. Doc. No. 248 (79th Cong., 1st Sess.), p. 213. "A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative * * * resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies." *Id.* at p. 289, fn. 21.

should be noted that in *Skinner* the Court of Appeals for the Ninth Circuit recognized the possibility that, if an administrative appeal had been taken, the registrant's claim for exemption as a conscientious objector might well have been sustained (215 F. 2d at 768). But this possibility did not preclude affirmance of the conviction.

Petitioner's refusal to utilize the administrative process appears to have stemmed from sincere religious considerations which to him seem compelling. The trial judge so recognized when he imposed a fine only and suspended imposition of sentence of imprisonment, placing petitioner on probation. We do not question petitioner's sincerity. But we urge that the principle by which he seeks to avoid the consequences of his refusal to submit to the administrative process is by no means unique to this case. To date, the rule requiring exhaustion of the administrative process has, consistently with the decisions of this Court, been rigorously applied in selective-service cases. As a result, persons who have felt themselves aggrieved by the draft classifications given them by their local boards, including registrants from such groups as the Jehovah's Witnesses, have, by and large, used the administrative appeal procedures established by Congress. They have not infrequently been upheld on appeal either by their state appeal board or the National Selective Service Appeal Board. Others, whose claims were not upheld on appeal, have been re-

jected by the services when they reported for induction on physical or other grounds. To countenance in this case a relaxation of the exemplary exhaustion rule, in both its aspects, might well impair the future usefulness of the appeal procedures, and to some extent at least, transfer to the courts the task of reviewing draft classifications in the first instance, and in some cases, as where the registrant would be rejected on physical grounds, unnecessarily. We submit that such a relaxation would be inconsistent with the statutory scheme established by Congress for the orderly and efficient administration of the selective service laws.

CONCLUSION

The decision below is in accord with the principles established by this Court and consistently followed by the courts of appeals. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1955.

APPENDIX

The pertinent portions of the Universal Military Training and Service Act provide:

Section 6 (g) (50 U. S. C. App. 456 (g)):

> Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, * * * shall be exempt from training and service (but not from registration) under this title.

Section 6 (i) (2), (50 U. S. C. App. 456 (i) (2)):

> Any person who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution is ordered to report for induction under this title, shall, upon the facts being presented to the local board, be deferred (A) until the end of such academic year, or (B) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier * * *.

Section 6 (j), (50 U. S. C. App. 456 (j)):

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form * * *.

Section 10 (b) (3), (50 U. S. C. App. 460 (b) (3)):

> The President is authorized—
>
> * * * * *
>
> (3) to create and establish within the Selective Service System civilian local boards * * *. * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *

The pertinent Selective Service Regulations (32 C. F. R. [1951 ed.]) provide as follows:

Section 1613.41 (32 C. F. R. 1613.41):

> (a) An inmate of an insane asylum, jail, penitentiary, reformatory, or similar institution, who is required to be registered on the day he leaves such institution, shall be registered in the manner prescribed in this section. The superintendent or warden of any such institution or any person designated by the superintendent or warden shall perform the duties of registrar.
>
> * * * * *
>
> (d) The superintendent, warden or other designated person shall mail the Reg-

istration Card (SSS Form No. 1) of a person registered under the provisions of this section to the local board having jurisdiction over the area in which the institution is located.

Section 1622.1 (32 C. F. R. 1622.1):

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it * * *.

Section 1622.14 (32 C. F. R. 1622.14):

In Class I–O shall be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces.

Section 1622.15 (32 C. F. R. 1622.15):

(b) In Class I–S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and during his academic year at such institution is ordered to report for induction * * *. A registrant who is placed in Class I–S under the provisions of this paragraph shall be retained in Class I–S (1) until the end of his academic year, or (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier * * *.

Section 1622.43 (32 C. F. R. 1622.43):

In Class IV–D shall be placed any registrant:

* * * * *

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school * * *

Section 1623.1 (32 C. F. R. 1623.1):

(a) Each registrant shall be classified as soon as practicable after his Classification Questionnaire (SSS Form No. 100) is received by the local board or as soon as practicable after the time allowed for him to return his Classification Questionnaire (SSS Form No. 100) has expired.

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file * * *.

Section 1626.2 (32 C. F. R. 1626.2):

(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.

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